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IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,
PUBLIC UTILITY COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
I. RESPONDENTS CANNOT RECONCILE THE LOWER COURT DECISION WITH THIS COURT'S PRECEDENT	2
A. The Case Involves Intrastate Telecommunications.	2
B. This Court's Precedent Does Not Allow the FCC to Set Intrastate Rates.	4
C. The FCC Claims an Ultra Vires Power To Set Intrastate Rates Under Section 201 Despite This Court's Precedent.	6
D. The FCC Encroaches On The States' Right to Set Intrastate Rates.	7
E. The PaPUC Continually Challenged the FCC's End-to-End Analysis.	9
II. THIS DEPARTURE FROM PRECEDENT HAS LONG-TERM IMPLICATIONS.	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000) 3

CONSTITUTION

U.S. Const. amend. X 4, 10, 11, 12

ADMINISTRATIVE DECISIONS

DQE Communications Network Services v. North Pittsburgh Telephone Company, FCC File No. EB-05-MD-027 3

Fiber Technologies v. North Pittsburgh Telephone Company, FCC File No. EB-05-MD-014 (February 23, 2007) 3

In re: Intercarrier Compensation, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 6, 2008) 5

In re: Intercarrier Compensation, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 8, 2008) 7, 10

In re: Time Warner, Inc., Docket No. WC 06-55 (March 1, 2007) 3

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001) 4, 5, 7, 10, 12

Order on Mandamus, 24 FCC Rcd 6475 (2008) 4, 12

Wireline Broadband Order, 20 FCC Rcd at 14910-11 (2005) 3

TABLE OF AUTHORITIES—Continued

Page

STATUTES

Communications Act of 1934,
47 U.S.C. §§ 151–615b 3, 5, 6, 11, 12
47 U.S.C. § 201 ..... *passim*
47 U.S.C. § 251 ..... *passim*
47 U.S.C. § 251(i) 6, 11
47 U.S.C. § 252 ..... *passim*
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 3, 5, 11, 12

OTHER AUTHORITY

FCC, Local Competition Report (September 2010) 8

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The Respondents' linguistic contortions cannot make the lower court's decision consistent with this Court's precedent. This Court limits the FCC's authority in Sections 251 and 252 of the Telecommunications Act of 1996 to establishing a cost-based pricing model that the states use to set the rates for local calls. Telecommunications Act of 1996, Pub. L. No. 101-104, 47 U.S.C. §§ 251, 252. The claim that $.0007 is not a rate but a pricing model elevates form over substance. The FCC incorrectly cites Section 201 and a need to ensure that local rates are just and reasonable as the basis for setting local rates.

I. RESPONDENTS CANNOT RECONCILE THE LOWER COURT DECISION WITH THIS COURT'S PRECEDENT.

A. The Case Involves Intrastate Telecommunications.

The Pennsylvania Public Utility Commission (PaPUC) seeks review of the $.0007 rate imposed on intrastate local calls. Respondents defend the rate as a pricing rule or an interstate rate under Section 201. 47 U.S.C. § 201

The local call at issue is a dial-up local call that originates and terminates within a local calling area, an area defined by the states. A customer dials the local number of an Internet Service Provider (ISP). The ISP's carrier takes that local call to an intrastate end-office where the call terminates. The ISP's carrier gets paid reciprocal compensation for carrying those local calls. Following termination at the end-office, the ISP provides internet access.

The FCC conflates what an ISP does to an intrastate call *after* the call is terminated to determine who sets the rate on the local call. The FCC's ratemaking power is premised on what occurs *after* local calls terminate. This is like suggesting that a local call to a local radio station talk show host is an interstate call subject to interstate rates because the call may be broadcast nationwide.

The FCC's reliance on an end-to-end analysis to support the result is incorrect and inconsistent.

This Court prohibits the FCC from imposing rates on local calls that originate and terminate within a state. This new approach also contradicts the FCC's holdings that wholesale service can be telecommunications regardless of the service provided by whole-

sale telecommunications. *PaPUC Writ* at 17-18 citing *In re: Time Warner, Inc.,* Docket No. WC 06-55 (March 1, 2007); *Fiber Technologies v. North Pittsburgh Telephone Company,* FCC File No. EB-05-MD-014 (February 23, 2007); *DQE Communications Network Services v. North Pittsburgh Telephone Company,* FCC File No. EB-05-MD-027; *Wireline Broadband Order*, 20 FCC Rcd at 14910-11, ¶ 104.

The FCC circumvents precedent by claiming that its Section 201 authority over *interstate* communications warrants *rates* on local calls.

The Respondents portray the $.0007 rate as a rate cap set under a pricing rule for interstate service or telecommunications traffic under Section 201. This linguistic sleight-of-hand is inconsistent with this Court's precedent. It also ignores the physical termination point for an intrastate local call.

This Court never held that Section 201 of the 1934 Act gives the FCC *carte blanche* power to set an interstate rate for local calls, including calls within Sections 251 and 252. If that were the case, the FCC would have been setting local rates since 1934.

This Court's precedent on the 1996 Act upheld a TELRIC pricing model. TELRIC contains no rates and includes joint and common costs. Precedent prohibits the FCC from setting local rates. *Iowa Utilities Board v. FCC*, 219 F.3d 744, 756-757 8th Cir. 2000).

The Respondents are also silent on the new pricing rule. That is because this new rule is defended under Section 201 as a means of ensuring that local rates are just and reasonable.

In fact, the decision upholds the abandonment of TELRIC, the exclusion of joint and common cost, and a $.0007 rate that has no relationship to cost by the FCC's admission. *Order on Mandamus,* 24 FCC Rcd 6475, ¶ 24 (2008); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151,* ¶ 7 *(2001) (ISP Remand Order).*

The FCC ignores this Court's prohibition against setting rates for intrastate calls under Sections 251 and 252. The FCC asserts that Section 201 requires imposition of an interstate rate to ensure a just and reasonable rate under Section 201. This usurps the states' role is setting local rates and conflicts with Eighth Circuit precedent overturning proxy rates the FCC previously tried to impose on the states.

A writ is needed to preserve this Court's precedent, the 10th Amendment, and Congressional acts from being overturned with a sleight-of-hand called end-to-end analysis.

B. This Court's Precedent Does Not Allow the FCC to Set Intrastate Rates.

The FCC's basic premise is that Section 201 allows the FCC to ignore this Court's precedent on Sections 251 and 252. The FCC uses Section 201 to avoid that unfavorable precedent and impose rates under Section 201.

But, again, this Court held that Sections 251 and 252 governing intrastate local calls limit the FCC authority to establishing a pricing model. The states set rates based on that federal model. There is no exception allowing the FCC to replace state-set rates

with an FCC rate under Section 201 based on some end-to-end analysis.

The Respondents ask this Court to deny review because this Section 201 ratemaking power is confined to a diminishing market for dial-up local calls. See *FCC Brief* at 12; *Carriers Brief* at 29-35.

This decision is much broader. The decision positions the FCC to pursue its goal of imposing a unified rate on all telecommunications devoid of jurisdictional or regulatory distinctions. *Compare FCC Brief* at 24-25 with *ISP Remand Order*, ¶¶ 6-7, 28 and 29, Appendix A, ¶¶ 198, 205, 221 and Appendix C, ¶¶ 192, 200, 216

The decision positions the carriers to have the FCC impose the unitary rate of $.0007 on *all* telecommunications that they seek. Compare *Carriers Brief* at 1-2 and 29-35 with *In re: Intercarrier Compensation*, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 6, 2008) at 1-2 (emphasis supplied). It is no coincidence that the $.0007 rate at issue in this case is also more broadly sought elsewhere.

The Court's precedent limits the FCC's power under Sections 251 and 252 to establishing a model but not rates. The Respondents can acquire the authority to impose a unitary federal rate by citing this new Section 201 precedent.

A problem arises because Section 201 in the 1934 Act never authorized the FCC to set intrastate rates. Were it otherwise, the FCC would have been regulating local rates since 1934.

Another problem also arises because Sections 251 and 252 in the 1996 Act never authorized the FCC

to bring local calls within Section 201. Were it otherwise, the FCC would have been setting local rates since 1996.

Respondents further rely on the savings clause of Section 251(i). 47 U.S.C. § 251(i). But, Section 251(i) only preserved the FCC's Section 201 authority over interstate rates and service. Section 251(i) never saved any FCC power in the 1934 Act over local rates. Since the FCC lacked power to set local rates, there was nothing to save.

A writ corrects these expansive interpretations

C. The FCC Claims an *Ultra Vires* Power To Set Intrastate Rates Under Section 201 Despite This Court's Precedent.

The FCC concedes that Sections 251 and 252 apply to the ISP-bound calls at issue. But, those rates must be consistent with Sections 251 and 252, e.g., determined by the states using an FCC model. The FCC's claim that it can exercise authority to ensure just-and-reasonable rates under Section 201 based on an interstate service provided after a call terminates does not obviate Section 251 and Section 252 requirements or precedent.

Any actions the FCC takes under Section 201 must be consistent with the mechanism Congress provided in Sections 251 and 252: the FCC ensures just-and-reasonable rates by establishing a cost-based methodology for the States to apply.

The FCC's approach creates a conflict of §201 with Sections 251 and 252 that can be completely avoided. The Section 252 requirement of just-and-reasonable rates based on cost, as established by the States using the FCC's methodology, is consistent with the

requirement of just-and-reasonable rates in §201 and precedent.

A Writ can prevent the FCC from putting two provisions in conflict in order to usurp the states' right to set local rates.

D. The FCC Encroaches On The States' Right to Set Intrastate Rates.

The FCC cites the National Broadband Plan and transitioning internet access from dial-up to broadband as proof of the *de minimis* nature of its encroachment. *FCC Brief* at 23-24, n. 9. Their claim that its Section 201 authority to set the rate for local calls under Sections 251 and 252 will apply only to dial-up local calls is a mischaracterization.

The claim of minor encroachment on the states right to set local rates is belied by the FCC's intentions. The FCC has announced its intention to set unitary intercarrier compensation at rates that eliminate jurisdictional and regulatory distinctions. Compare *FCC Brief* at 25 with *ISP Remand Order*, ¶¶ 6-7, 28 and 29, Appendix A, ¶¶ 198, 205, 221 and Appendix C, ¶¶ 192, 200, 216.

The carriers equally mischaracterize the decision. Their claim that the new rate applies only to dial-up local calls is belied by other filings urging the FCC to impose the same rate on *all* telecommunications. Compare *Carriers Brief* at 29-35 with *In re: Intercarrier Compensation*, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 8, 2008) at 1-2 (emphasis supplied).

The Respondents portray the $.0007 rate as a remedy for economic arbitrage in a unique market where there is asymmetrical traffic and compen-

sation imbalances. This is another mischaracterization. *Carriers Brief* at 29-35. The mischaracterization is evident in the carriers recognition that the decision is not limited to local intrastate calls to access the internet. The decision also includes local voice traffic with other LECs and wireless carriers as well. *Carriers Brief* at 28.

The Carriers further mischaracterize the market for dial-up local calls as diminishing or a situation of unique imbalance. *Carriers Brief* at 1-2 and 29-30.

This portrayal is contradicted by the FCC's *Reports on Competition*. In local markets, incumbent carriers continue to possess an inordinate market presence compared to competitors. Those markets are asymmetrical. They have compensation imbalances. See FCC, *Local Competition Report (September 2010)*, Table I, End-User Switched Access Lines, Non-ILEC share is 28.1%. That asymmetrical traffic and compensation imbalance favors incumbents over competitors given that incumbent customers make more calls to competitors that competitor customers make to incumbent customers.

There is nothing unique or diminishing with asymmetrical traffic or unbalanced compensation. The only unique aspect is that competitors got more money from incumbents than incumbents got from competitors for local dial-up calls. The remedy is a unified FCC rate.

But, this encroachment on the states' right to set local rates under Section 201 has no limits on the scope of the FCC's power. Unlimited power to impose rates without limits or jurisdictional distinctions is more representative of the Respondents' intentions than claims that the case is only about a diminishing market and arbitrage.

Their language is not the language of a minor rate for a diminishing class of service in a shrinking market with unique characteristics. It is the language of carriers and a federal agency seeking unfettered power to set all telecommunication rates.

A writ is warranted.

E. The PaPUC Continually Challenged the FCC's End-to-End Analysis.

The PaPUC asks this Court to grant the writ to remedy the lower court's conclusion that the PaPUC never challenges the FCC's end-to-end analysis. *FCC Brief* at 10-11, 13.

In fact, the PaPUC continually opposed the FCC's so-called end-to-end analysis. The PaPUC disputed that this end-to-end analysis allowed the FCC to set rates for intrastate local dial-up calls to an ISP. The PaPUC consistently maintained that the end-to-end analysis was "internally inconsistent" and "clearly erroneous" from the start. *Pennsylvania Writ* at 18 citing *Brief of the Petitioner and the Intervening States, C.A. Joint Brief* at 30-33.

The PaPUC noted the FCC's admission that the local dial-up call originated and terminated intrastate at the called party's premises. *Joint Brief* at 10-11. The PaPUC then referenced the FCC's acknowledgement that the call path between the end-user and the ISP typically lies entirely within a local calling area, an area defined by the states. *Joint Brief* at 10-11.

The PaPUC and other states never accepted the FCC's faulty end-to-end analysis because it "completely fails to explain how the ISP's post-termination handling of a call has any bearing upon the recovery

of the terminating LEC's costs of transporting and termination the call" as required by Sections 251 and 252 of federal law. Compare *Joint Brief at 12* and *Joint Brief of the Petitioner and the Intervening States, C.A. Joint Brief*, at 30-33 with *FCC Brief* at 10-11, and 13, and *Carriers Brief* at 14-18 and 27-29.

II. THIS DEPARTURE FROM PRECEDENT HAS LONG-TERM IMPLICATIONS.

This Court should not be deceived by claims that there is no long-term impact. Respondents may differ on whether the decision addresses interstate communications service or interstate telecommunications traffic but they agree on the FCC's power. *FCC Brief* at I and *Carriers Brief* at I.

The decision furthers the agency's intention to impose a unified rate on all telecommunications without regard to jurisdictional or regulatory distinctions using Section 201. *Compare FCC Brief* at 24-25 with *ISP Remand Order*, ¶¶ 6-7, 28 and 29, Appendix A, ¶¶ 198, 205, 221 and Appendix C, ¶¶ 192, 200, 216. This Court should not dismiss the PaPUC or Core concerns about Section 201 as theoretical.

The decision furthers the carriers' goal of having the FCC impose the $.0007 rate at issue in this case, which they refer to here as a pricing rule, on *all* telecommunications traffic. *Compare Carriers Brief* at 1-2 and 29-35 with *In re: Intercarrier Compensation*, Docket No. 01-92, *Ex Parte Letter of Verizon, AT&T, Sprint, et al* (August 8, 2008) at 1-2 (emphasis supplied).

That is why the Respondents downplay any long-term impact from this decision, particularly on the 10th Amendment. That Amendment does not authorize a federal regulator to usurp the states right to

set rates for intrastate local calls. The Respondents' silence on that Amendment is telling. The Respondents never addressed the constitutional concern with a unified FCC intercarrier compensation regime that is devoid of jurisdictional or regulatory distinctions and applicable to all telecommunications.

The Act of 1934 never gave the FCC authority to remove jurisdictional or regulatory barriers in order to replace state-set local rates with interstate rates imposed under Section 201. Otherwise, the FCC would have been setting intrastate rates for local calls since 1934.

The Act of 1996 in Sections 251 and 252 does not empower the FCC to remove those distinctions by replacing state-set rates with interstate rates. There is no provision allowing the FCC to supplant Sections 251 and 252 with Section 201 rates using a newly minted FCC ratemaking power.

The Respondents' reliance on the 1996 Section 251(i) savings clause for Section 201 is unavailing. The FCC had no authority to regulate intrastate rates in 1934. The 1996 Act never gave the FCC that intrastate ratemaking authority. There is simply no pre-existing or ongoing Section 201 authority to save when it comes to the FCC's new power to impose interstate rates on intrastate local calls that is particularly when, as here, the intrastate call is clearly severable from the subsequent interstate service.

This Court's precedent reconciles the Acts of 1934 and 1996 with the 10th Amendment by holding that Sections 251 and 252 do not expand the FCC's authority to include local rates setting authority. The FCC can establish a pricing methodology, currently TELRIC.

The Court's precedent creates a workable federalist structure. The Court has meshed traditional state authority over intrastate matters in the 10th Amendment with the Acts of 1934 and 1996.

The new rule overturns that structure. The Respondents defend the FCC's new power over intrastate local rates under Section 201 as a necessary remedy. But, this new rule allows the FCC to replace state-set reciprocal compensation rates under Sections 251 and 252 with FCC rates imposed under Section 201. This decision allows the FCC to do that whenever the FCC decides that a unitary rate without jurisdictional or regulatory distinctions is warranted.

CONCLUSION

This Court's precedent limits the FCC to establishing a pricing model. The FCC cannot set rates for intrastate local calls. The new rule affirms a $.0007 rate imposed by the FCC on an intrastate local call under Section 201.

This Court's precedent upholding the TELRIC model contained joint and common cost recovery and no rates. The pricing model upheld in the *Order on Remand* contains no joint and common costs and imposes a $.0007 rate that bears no relationship to cost by the FCC's own admission. See *Order on Mandamus*, 24 FCC Rcd 6475, ¶ 24 (2008); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier-Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151*, ¶ 7 *(2001) (ISP Remand Order)*.

As this Court has held, it is a function of the states to set reciprocal compensation rates for intrastate calls using the federal pricing model. The PaPUC asks this Court to stop the FCC's attempt to encroach upon this states' right.

A writ is appropriate.

Respectfully submitted,

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